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Supreme Court, U.S.
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No. 02-66

In The
Supreme Court of the United States

THE CITY OF FEDERAL HEIGHTS, COLORADO,

Petitioner,

v.

ESSENCE, INC., a Colorado corporation, d/b/a THE BARE ESSENCE, DEVONA RICHELLE LOPEZ and LISA EASTON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals To The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals for the Tenth Circuit reversibly err in striking down the Federal Heights prohibition on 18-20 year old persons from seeing or presenting protected expression in the form of nude dancing where no evidence was presented to support this prohibition?

2. Does the prohibition on 18-20 year old persons from seeing or presenting protected expression in the form of nude dancing violate the First and Fourteenth Amendments to the United States Constitution?

3. Did the District Court abuse its discretion in refusing to consider a previously undisclosed former dancer's affidavit submitted on the date of the hearing on the cross-motions for summary judgment relating to alleged activities at the Respondent corporation's establishment?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The United States Court of Appeals for the Tenth Circuit and Colorado District Court accurately set forth the facts related to the constitutional challenges brought in the instant case. [Pet. App., pp. 1a-32a, 33a-56a]. Respondents herein brought a challenge to a Federal Heights, Colorado ordinance imposing a licensing requirement on adult entertainment businesses pursuant to 42 United States Code §1983. [Pet. App., pp. 86a-103a]. Among the restrictions was a prohibition contained in Section 12-12-11(B) of the Federal Heights Municipal Code which states:

> Additionally, it shall be unlawful for any person under twenty-one years of age to be upon the premises of any adult entertainment establishment which offers live nude dancing.

The constitutionality of this provision is the principle issue before this Court.

The District Court struck down this provision as it related to persons providing expression including nude dancing but upheld it with regard to patrons of the adult entertainment establishment. [Pet. App., pp. 38a-39a]. On appeal, the Tenth Circuit invalidated Section 12-12-11(B) in its entirety. [Pet. App., pp. 15a-28a]. Contrary to the City's erroneous statement in the Petition for Writ of Certiorari, p. 14, the Tenth Circuit also declared the employee licensing provision unconstitutional on the basis that it did not provide any avenue for judicial review as

required by *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215 (1990). [Pet. App., pp. 28a-30a].

REASONS FOR DENYING THE WRIT

I. THE TENTH CIRCUIT DID NOT ERR IN STRIKING DOWN THE PROHIBITION ON PERSONS UNDER THE AGE OF 21 FROM PRESENTING OR SEEING PROTECTED EXPRESSION WHERE NO EVIDENCE EXISTED TO SUPPORT SUCH A PROHIBITION

The City of Federal Heights asserts that the age restriction contained in the Section 12-12-11(B) is justified as a content neutral regulation of the secondary effects of nude dancing on persons between the ages of 18 and 20. In the Petition, the City, for the first time, asserts that the age prohibition "attempts to limit the negative secondary effects caused by exposing young and impressionable individuals to an atmosphere potentially teeming with tempting, illicit substances" and to "ensur[e] that its young people are not exposed to illicit substances or engage in underage drinking which is illegal under Colorado statutory law." [Pet., p. 26]. "Federal Heights concluded that despite the ban on the sale of alcoholic beverages at nude dancing establishments, alcohol was still likely to be present, and young people were still likely to be exposed to it." [Pet., p. 28]. The term "young people" – apparently refers to adults between the ages of 18 and 20.

The City goes on to argue that the Tenth Circuit holding in this case imposes greater burden on the City to justify its prohibition on protected speech for 18 to 20 year

old persons than required by the recent decision in *City of Los Angeles v. Alameda Books, Inc.*, ___U.S. __, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002). However, the City's reliance on *Alameda Books* is misplaced.

The plurality opinion of Justice O'Connor, commanding the opinion of four justices, reaffirmed the analysis set forth in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), with some clarification regarding the procedure for the evaluation of evidence advanced by both sides on the justification by the government to support the regulation of protected speech.

While the plurality relied upon *Renton* for the principle that a municipality may rely upon relevant evidence to demonstrate a connection between speech and a substantial independent government interest, it indicated that the government must prove more than just some rational relationship between the regulation and the government interest. "This is not to say a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance." *City of Los Angeles v. Alameda Books, Inc.*, __U.S. at___, 122 S. Ct., at 1736.

The evidence offered by the City reveals that the age prohibition in the instant case was indeed based upon shoddy data and reasoning. Both of the lower courts found that Federal Heights wholly failed in its obligation to advance a valid justification or evidence to support the prohibition on 18 to 20 year old adults from seeing or presenting protected expression at certain businesses.

Justice Kennedy provided the fifth vote in an opinion concurring in the judgement in *Alameda Books*. The main premise of Justice Kennedy's opinion was that "a city may

not regulate the secondary effects of speech by suppressing the speech itself. . . . Though the inference may be inexorable that a city could reduce secondary effects by reducing speech, this is not a permissible strategy. The purpose and effect of a zoning ordinance must be to reduce secondary effects and not to reduce speech." *Id.* at 1739-40.

In addressing the specific issue before the Court, Justice Kennedy indicated that a municipality must advance some evidence that the quantity and access to speech is not significantly limited by regulations to reduce adverse, external secondary effects:

> [A] city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact. The ordinance may identify the speech based on content, but only as a shorthand for identifying the secondary effects outside. A city may not assert that it will reduce secondary effects by reducing speech in the same proportion. On this point, I agree with JUSTICE SOUTER. See post, at 5. The rationale of the ordinance must be that it will suppress secondary effects – and not by suppressing speech.

Id. at 1742.

Federal Heights has undertaken to limit adverse secondary effects by prohibiting the speech of legal adults on the basis of their age. This prohibition applies to both the person engaged in expressive conduct, as well as the audience of this speech. "It is no trick to reduce adverse secondary effects by reducing speech or its audience; but a city may not attack secondary effects indirectly by attacking

speech." *Id.* Here speech is prohibited to one group of adults to indirectly attack secondary effects.

In the Petition, the City cites several Colorado statutes and regulations concerning prohibitions on the use of alcohol by persons under 21 years of age. It is instructive to note that these statutes were not cited as a justification for the prohibition at any point by the City before the City Council in enacting this ordinance, or before the District Court or Court of Appeals in defending the ordinance.

The City seems to equate the regulation of alcoholic beverages with the regulation of speech. The City's argument is that if the government may prohibit the sale of alcoholic beverages to persons under the age of 21, it may also justify prohibitions on speech to those persons in establishments where alcohol is not served. Under this argument, if the State of Colorado raised the drinking age to 55, or completely prohibited alcoholic beverages, it could prohibit certain speech to avoid the adverse effects of alcohol to anyone it determines to be a vulnerable person. However, even the City would not dare suggest that the government's ability to outlaw speech is on the same level as the government's power to prohibit alcoholic beverages.

The City also cites several Colorado statutes and regulations concerning the legal age at which individuals are permitted to consume alcoholic beverages in Colorado, apparently to support its determination that 21 years of age is a valid cut off point for exercising First Amendment rights. However, the City incorrectly implies that in Colorado persons under the age of 21 are not allowed any access to alcoholic beverages. [Pet., p. 28]. The City's reasoning is seriously undermined by one of the statutes it provides that expressly allows persons under the age of 21

to be employed at, sell or dispense alcoholic beverages at liquor licensed establishments. *See*, Colorado Revised Statutes §12-47-901(5)(a)(1). [Pet. App., 72a].[1]

Thus, under the City's argument, an eighteen year old may legally serve liquor in a bar, but may not exercise First Amendment rights in an establishment where liquor is prohibited. The reasoning employed by Federal Heights to justify this prohibition on protected speech is exactly the shoddy reasoning that the plurality opinion in *Alameda Books* warned against. As such, the decision of the Tenth Circuit that Section 12-12-11(B) is unconstitutional is correct and the City's Petition for Certiorari should be denied.

II. FEDERAL HEIGHTS MUNICIPAL CODE §12-12-11(B) SHOULD NOT BE EVALUATED AS A TIME, PLACE AND MANNER RESTRICTION ON PROTECTED SPEECH SINCE IT ABSOLUTELY PROHIBITS ONE CLASS OF ADULTS FROM SEEING OR ENGAGING IN SPEECH

The City has never disputed the District Court's determination that 18 year olds are considered adults and are not legally classified as minors under numerous Colorado statutes. [Pet. App., pp. 37a-39a]. However, the City maintains that the age restriction is a time, place,

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[1] Colorado Revised statutes, section 12-47-901(5)(a)(1) provides:

"[N]o person under the age of twenty-one years of age shall be employed to sell or dispense malt, vinous, or spirituous liquors unless he or she is supervised by another person who is on premise and has attained the age of twenty one years of age."

and manner regulation of protected speech enacted "to limit the negative secondary effects caused by exposing young and impressionable individuals to an atmosphere potentially teeming with tempting, illicit substances." [Pet., p. 26].

Recently, in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997), the Court rejected a similar argument concerning "cyber-zoning" of the internet as a time, place and manner restriction in striking down the Communications Decency Act (CDA), 47 U.S.C. §223.

Justice O'Connor, in her dissenting (in part) opinion, dealt extensively with the "zoning" law analogy:

> The creation of "adult zones" is by no means a novel concept. States have long denied minors access to certain establishments frequented by adults. States have also denied minors access to speech deemed to be "harmful to minors." The Court has previously sustained such zoning laws, but only if they respect the First Amendment rights of adults and minors. That is to say, a zoning law is valid if (i) it does not unduly restrict adult access to the material; and (ii) minors have no First Amendment right to read or view the banned material. [Footnotes omitted] 475 U.S., at 877-888.
>
> * * *
>
> Our cases make clear that a "zoning" law is valid only if adults are still able to obtain the regulated speech. If they cannot, the law does more than simply keep children away from speech they have no right to obtain – it interferes with the rights of adults to obtain constitutionally protected

> speech and effectively "reduces the adult population . . . to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383, 1 L. Ed. 2d 412, 77 S. Ct. 524 (1957). The First Amendment does not tolerate such interference. 475 U.S. at 888

Section 12-12-11(B) of the Federal Heights Municipal Code wholly denies adults between 18 and 20 years of age the ability to see or present protected expression. The ordinance completely bars this segment of the adult population from this type of speech and effectively reduces this category of legally recognized adults to the level of children.

The City repeatedly asserts that the age restriction is directed at the secondary effects of nude dancing on persons between the ages of 18 to 20. These secondary effects now identified by the City are that persons between the ages of 18 to 20 are at "greater risk" of being affected by exposure to an atmosphere that could involve exposure to illicit substances.

The City has artfully attempted to manufacture a valid justification out of thin air. The only evidence advanced by Federal Heights to support the age prohibition is an affidavit from the Mayor Pro Tem. Both the District Court [Pet. App., p. 38a-39a] and the Tenth Circuit [Pet. App., p. 27a] rejected this affidavit as inadequate to support the ordinance.

The Mayor's conclusory statement provides no valid evidentiary foundation on which to base the prohibition of a segment of the adult population from engaging in protected speech. Indeed, the City has provided absolutely no evidence that the alleged adverse secondary effects of nude dancing have any particular special impact on adults

between the ages of 18 and 20, nor do any of the studies relied upon by the City deal with the issue of 18 to 20 year olds at nude dancing establishments in any way, shape or form. In short, the City did not rely on any real evidence relating to the alleged secondary effects of such entertainment on 18 to 20 year olds.

In addition, there is not a single mention in the legislative record of any justification for arriving at the age of 21 as the cut off point for protected speech. The City might just as well have arrived at the ages of 31, 54, or 83 as the point at which adults need protection from the alleged "adverse secondary effects" of nude entertainment. Surely, restricting the expression and receipt of nude dancing to senior citizens would be considered a content based restraint of expression subject to strict scrutiny. The City's effort to package this age restriction as a content neutral regulation to protect "young persons" from the evils of exposure to "illicit substances" is nothing more than a semantic ruse. As such, Section 12-12-11 was properly declared unconstitutional.

Moreover, none of the "whereas" clauses in the challenged enactment contain any reference to adults between the ages of 18 to 20 years as being particularly vulnerable to the alleged adverse secondary effects of adult businesses. *See also, United States v. Playboy Entertainment Group,* __ U.S. __, 146 L. Ed. 2d 865, 120 S. Ct. 1878 (2000) (striking down §505 of Communications Decency Act imposing cable television restrictions of adult entertainment).

Based upon the fact that Section 12-12-11 imposes a complete restraint on protected speech for a segment of the adult population on the basis of the content of that speech in the absence of *any* valid evidence to support

such a total restriction, the age restriction clearly violates the First and Fourteenth Amendments to the United States Constitution.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ADMIT NEW EVIDENCE AT THE HEARING ON THE MOTIONS FOR SUMMARY JUDGMENT

At the March 19, 1999 hearing on the motions for summary judgment [Pet. App., pp. 59a-62a], the City sought to offer the affidavit of Jennifer Weaver [Pet. App., pp. 63a-66a]. In the affidavit dated March 18, 1999, a former employee of Respondent's establishment, made numerous new allegations of unsavory conduct at the establishment.

Respondents never had any opportunity to investigate or rebut these allegations in any way. At the hearing, the District Court refused to allow the last minute evidence stating, "it was not going to rely on it for the purposes of this argument." [Pet. App., p. 62a]. The Tenth Circuit carefully evaluated the District Court's ruling and determined that the refusal to admit this affidavit was not an abuse of discretion. [Pet. App., p. 26a].

Under these circumstances, it is clear the District Court did not abuse its discretion in rejecting this last minute, prejudicial evidence that Respondents had never before seen, from a witness who had never been disclosed at any point previously in the litigation. Respondents could not be expected to fairly present rebuttal evidence or arguments concerning these previously undisclosed allegations.

As summed up by the Tenth Circuit, "the City's position is essentially that an abuse of discretion arises

whenever a district court refuses to consider evidence necessary to one party's case." [Pet. App., p. 26a]. Based upon the circumstances of this case, the Tenth Circuit was not prepared to accept such an argument. This Court should not accept the City's invitation either.

CONCLUSION

Based upon the foregoing arguments and authorities, Respondents respectfully request the Court to deny the Petition for Writ of Certiorari.

Dated: September 3, 2002.

Respectfully submitted,

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